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In The

Supreme Court of the United States

October Term, 1979

No. 79-1637

J. P. STEVENS & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Applicable Constitutional and Statutory Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 5

a. The extraordinary remedies ordered by the Board are not designed to undo the effects of the violations of the Act 6

b. The extraordinary remedies ordered by the Board do not adequately protect the legitimate interests of the employer 10

Conclusion 17

Certificate of Service 18

Appendix A1

Table of Authorities

I. COURT CASES

Babbitt v. United Farm Workers, ... U.S. ....., 60 L.Ed.2d 895 (1979) 10

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 10

Carpenters, Local 60 v. NLRB, 365 U.S. 651 (1961) 9

Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) 10, 11, 14-15, 16

Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) 6, 9, 14

Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) 6, 10

Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) 11

Florida Steel Corp. v. NLRB, 587 F.2d 735 (5th Cir. 1979) 9, 10, 13

Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) 10

Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911) 14
Hudgens v. NLRB, 424 U.S. 507 (1967) 10, 11
J. P. Stevens & Co., Inc. v. NLRB, 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 ..... 7, 8, 13
J. P. Stevens & Co., Inc. v. NLRB, 406 F.2d 1017 (4th Cir. 1968) 7, 8
J. P. Stevens & Co., Inc. v. NLRB, 417 F.2d 533 (5th Cir. 1969) 7
J. P. Stevens & Co., Inc. v. NLRB, 441 F.2d 514 (5th Cir. 1971) 7
J. P. Stevens & Co., Inc. v. NLRB, 449 F.2d 595 (4th Cir. 1971) 7
J. P. Stevens & Co., Inc. v. NLRB, 461 F.2d 490 (4th Cir. 1972) 7
J. P. Stevens & Co., Inc. v. NLRB, 547 F.2d 792 (4th Cir. 1976) 8
NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956) 10, 11, 13, 14, 15, 16
NLRB v. Baptist Hospital, Inc., 440 U.S. 979 (1979) 10
NLRB v. Baylor Medical Center, 439 U.S. 9 (1978) 10
NLRB v. J. P. Stevens & Co., Inc., 455 F.2d 607 (5th Cir. 1972) 7-8
NLRB v. J. P. Stevens & Co., Inc., 464 F.2d 1326 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 ..... 8, 14
NLRB v. J. P. Stevens & Co., Inc., 538 F.2d 1152 (5th Cir. 1976) 8
NLRB v. J. P. Stevens & Co., Inc., 563 F.2d 8 (2d Cir. 1977) 8, 14
NLRB v. S. & H. Grossinger's, Inc., 372 F.2d 26 (2d Cir. 1967) 13
Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) 10, 11

Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) 6, 9
Sears, Roebuck & Co. v. San Diego District Council of Carpenters, 436 U.S. 180 (1978) 11, 14
Textile Workers Union of America, AFL-CIO v. NLRB, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 ..... 7, 8, 13
Textile Workers Union of America, AFL-CIO v. NLRB, 475 F.2d 973 (D.C. Cir. 1973) 8
The Black Hawk Corp. v. NLRB, 431 F.2d 900 (4th Cir. 1970) 7, 8

II. Board Cases

Florida Steel Corp., 233 NLRB 491 (1977), *rev'd*, 587 F.2d (5th Cir. 1979) 9, 10
Florida Steel Corp., 242 NLRB No. 195 (1979) 10
J. P. Stevens & Co., Inc., 183 NLRB 267 (1970) 7
J. P. Stevens & Co., Inc., 205 NLRB 1032 (1973) 8
J. P. Stevens & Co., Inc., 220 NLRB 270 (1975) 8
J. P. Stevens & Co., Inc., 243 NLRB No. 159 (1979) 7, 15

III. Statutes

U.S. Const. Amend. V 2
28 U.S.C. § 1254(1) 2
29 U.S.C. § 157 2
29 U.S.C. § 158(a)(1) 3
29 U.S.C. § 160(c) 3, 8, 14
29 U.S.C. § 160(e) 2

IV. Other Authorities

Daily Labor Report No. 48, p. D-6 (March 10, 1980) 13
Hearings on S. 1883 before the Subcomm. on Labor of the Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 10
House Comm. Rep. on Labor Reform Act of 1977, 95th Cong., 1st Sess. (1977) 10

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, J. P. Stevens & Co., Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 8, 1980.

I. OPINIONS BELOW

The opinion of the court of appeals is reported at 612 F.2d 881.[1] The decision and order of the National Labor Relations Board (the Board) is reported at 240 NLRB No. 35.

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1. References to portions of the record, which are reproduced in the Appendix, are designated by their appropriate page numbers, preceded by "A".

II. JURISDICTION

The judgment of the court of appeals was entered on January 8, 1980. A timely petition for rehearing and suggestion for rehearing *in banc* was denied on February 12, 1980 (A33). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

III. QUESTION PRESENTED

May the Board deprive an employer of its property rights at each of its 81 plants for a period of two years, as a remedy for isolated violations of the National Labor Relations Act, by ordering that non-employee union representatives be permitted to enter onto company property to solicit employees, because of other previously remedied violations by the employer and without giving any consideration to the employer's legitimate business interests?

IV. APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Section 7 of the National Labor Relations Act [29 U.S.C. § 157] (the Act) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right

> to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) of the Act [29 U.S.C. § 158(a)(1)] provides:

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 10(c) of the Act [29 U.S.C. 160(c)] provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

V. STATEMENT OF THE CASE

The petitioner is a Delaware corporation with its principal office in New York, New York and is engaged in the manufacture of textile and textile-related products at 81 plants located in New England and throughout the Southeastern United States (A11). This case arose at one of the petitioner's plants located in Tifton, Georgia, during an organizing drive by the Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC (the union) in the summer of 1976 (A14-A22).

An administrative law judge of the Board found that a "lead person" at the Tifton Plant, whose supervisory authority was questioned, had asked a group of three employees if they had signed union cards and stated that break times would be handled differently if a union came in (A14, A16-A18). Both comments were made in the same conversation with the same group of employees (A16-A18). The administrative law judge also found that a shift supervisor had asked one employee, on one occasion, if he had signed a union card (A15). On the basis of these two incidents, the administrative law judge concluded that three violations of Section 8(a)(1) of the Act had occurred (A15, A18). To remedy these violations, the administrative law judge fashioned an order, limited to the Tifton Plant, which required that the petitioner cease and desist from interrogating and threatening employees and from otherwise interfering with employees' rights (A23).[2] He specifically declined to issue other requested remedies, stating that "the remedies recommended are adequate to eliminate the effects of the unfair labor practices found" (A25).

The Board adopted the findings of violations made by the administrative law judge, but substantially modified the remedial portion of his recommended order by adding numerous extraordinary remedies to be carried out at all of the employer's 81 plants (A3, A5-A6). Included among these extraordinary remedies were the following:

> 1. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for purposes of soliciting employees in the canteens and rest and other nonwork areas, including parking lots, for a period of two years;

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2. Although the order was limited to the Tifton Plant, the administrative law judge did require corporate wide posting of a notice to employees reflecting the cease and desist order (A24).

2. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of attending company meetings with employees where the question of union representation is addressed, with the right of equal rebuttal time for one of the union representatives present at the meeting, for a period of two years;

3. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of delivering a 30-minute speech to employees on working time, in any case where the Board schedules an election in which the union participates, for a period of two years; and

4. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of using plant bulletin boards, for a period of one year.

On review, the Fourth Circuit Court of Appeals perfunctorily concluded that "the Board acted within its discretion to remedy those unfair labor practices established in the record" (A32). Following the company's petition for rehearing and suggestion for rehearing *in banc,* on February 12, 1980, the Fourth Circuit, with two judges dissenting and two judges not participating, declined to rehear the case.

VI. REASONS FOR GRANTING THE WRIT

While the Board has broad discretion in fashioning remedies in unfair labor practice cases, its actions must be strictly confined to the limits imposed by Section 10(c) of the Act. ". . . [T]he rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action. The role that Congress . . . has entrusted to the courts in reviewing the Board's petitions for enforce-

ment of its orders is not that of passive conduit." *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 59 L.Ed.2d 333, 348 (1979). Specifically, the Court has instructed that the Board, in fashioning remedies under the Act, must be guided by two fundamental principles: (1) the remedy must be designed "to undo the effects of violations of the Act;"[3] and (2) the remedy must adequately protect the legitimate interests of the employer.[4] Punitive remedies are prohibited. *See Republic Steel Corp. v. NLRB,* 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 236 (1938). It seems abundantly clear that the Board and the Court of Appeals failed to heed these requirements.

a. The extraordinary remedies ordered by the Board are not designed to undo the effects of the violations of the Act

The Board's power to command affirmative action is remedial only and "is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation when those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. NLRB,* 305 U.S. at 236. Two acts of interrogation and one statement that breaks would be handled differently if a union came in, made by two minor supervisors and involving only four employees at one plant in Georgia, cannot be viewed as anything other than minor violations. Moreover, there is no indication in the record that the acts were brought to the attention of other employees at this Georgia plant. Certainly, no employee at any of the employer's other 80 plants in New England and other Southeastern States

3. *Detroit Edison v. NLRB,* 59 L.Ed.2d at 347.

4. *Id.,* 59 L.Ed.2d at 346-48.

felt the coercive effects of the actions.[5] The remedies the Board traditionally imposes for such minor violations are the entry of a cease and desist order and the posting of a notice to employees. *See J. P. Stevens & Co., Inc.*, 243 NLRB No. 159 (1979) (involving four acts of coercion and restraint at one of this same employer's plants in Alabama during 1977, where only traditional remedies were ordered because only "limited violations of a less than severe nature" were involved). With only certain differences not here contested, this is what the administrative law judge did in the instant case, and the general counsel of the Board who prosecuted the case made no objection that the judge's failure to impose various "access" remedies was error (A29). Nevertheless, the Board felt justified in authorizing the entry of union organizers to all of the employer's 81 plants, because of the employer's history of "violations of employee rights and its flagrant disregard of Board decisions" (A3).

The litigation history of this employer, involving unfair labor practices found to have occurred during the period from 1963 through 1975 is well documented.[6] Most of the cases in which the Court granted enforcement of the

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5. Nevertheless, this contingency was covered by the administrative law judge, who ordered that a notice be posted at all 81 plants of the employer. *Supra* note 2.

6. *See J. P. Stevens & Co., Inc. v. NLRB*, 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (*Stevens I*); *Textile Workers Union of America, AFL-CIO v. NLRB*, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (*Stevens II*); *J. P. Stevens & Co., Inc. v. NLRB*, 406 F.2d 1017 (4th Cir. 1968) (*Stevens III & IV*); *J. P. Stevens & Co., Inc. v. NLRB*, 417 F.2d 533 (5th Cir. 1969) (*Stevens V*); *The Black Hawk Corp. v. NLRB*, 431 F.2d 900 (4th Cir. 1970) (*Stevens VI*) (enforcement denied); *J. P. Stevens & Co., Inc. v. NLRB*, 441 F.2d 514 (5th Cir. 1971) (*Stevens VII*); *J. P. Stevens & Co., Inc. v. NLRB*, 449 F.2d 595 (4th Cir. 1971) (*Stevens VIII*) (enforcement denied); *J. P. Stevens & Co., Inc. v. NLRB*, 461 F.2d 490 (4th Cir. 1972) (*Stevens IX*); *J. P. Stevens & Co., Inc.*, 183 NLRB 267 (1970) (*Stevens X*) (no appeal; Board order nullified in view of court's reversal of *Stevens VI*); *NLRB v. J. P. Stevens & Co., Inc.*, 455

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Board's orders involved unfair labor practices in the employer's plants in North and South Carolina, and the remedies were always restricted to either the particular plants involved in the violations or the plants in North and South Carolina. *See Stevens I, II, III, IV, VI, VIII, IX, X, XIII, XIV, XV, XVI,* and *XVIII.* None of this litigation history involved the employer's plant in Tifton, Georgia, which is the subject of this proceeding. The last of the court orders was in 1977 and involved contempt proceedings, as distinguished from unfair labor practice proceedings governed by Section 10(c) of the Act. *See Stevens XVIII.* The sanctions imposed were designed to require the employer to expunge its acts of repeated contempt and represented the most severe non-monetary penalties ever imposed by a court of appeals upon an employer for violations of the Act. Yet, not even those remedies were extended to any of the employer's plants outside North and South Carolina, the two states in which the violations were found to have occurred. *Since the entry of this last contempt order, the Board has made no claim that the employer has violated any commitments under court orders.*

The petitioner having complied with the harsh remedies imposed as a result of previous violations, the Board does not possess the authority to *re-punish* it for those violations. The remedies ordered in the instant case must

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Footnote continued—

F.2d 607 (5th Cir. 1972) (*Stevens XI*); *Textile Workers Union of America, AFL-CIO v. NLRB,* 475 F.2d 973 (D.C. Cir. 1973) (Board order remanded) and *J. P. Stevens & Co., Inc.,* 205 NLRB 1032 (1973) (Board order on remand) (*Stevens XII*); *NLRB v. J. P. Stevens & Co., Inc.,* 464 F.2d 1326 (2d Cir. 1972), *cert. denied,* 410 U.S. 926 (*Stevens XIII*) (contempt); *J. P. Stevens & Co., Inc. v. NLRB,* 547 F.2d 792 (4th Cir. 1976) (*Stevens XIV* N *XV*); *J. P. Stevens & Co., Inc.,* 220 NLRB 270 (1975) (*Stevens XVI*); *NLRB v. J. P. Stevens & Co., Inc.,* 538 F.2d 1152 (5th Cir. 1976) (*Stevens XVII*) (contempt); *NLRB v. J. P. Stevens & Co., Inc.,* 563 F.2d 8 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (*Stevens XVIII*) (contempt).

be based upon the record in *this proceeding* and the compliance posture of the petitioner at the time of *this Board order*. But it is abundantly clear that this is not the case. The extraordinary "access" remedies imposed in this case are not designed to restore the status quo and bear no resemblance to the violations found. The Board did not, and indeed could not, find that the violations shown on this record were "serious" or "similar" to those which have called for harsh remedies in the past. The fact that four employees in Tifton, Georgia may have been coerced offers no excuse for permitting non-employee union organizers to enter company property to solicit employees in North and South Carolina, where the employer has admittedly brought itself into compliance with stringent contempt orders, or to warrant non-employee union organizers intervening in company meetings with employees at plants in Connecticut where no violations of the law have ever been found to exist. Indeed, it is inescapable that the Board has imposed *punitive remedies*—not because of what the petitioner has done in Tifton, Georgia—but because of the Board's continuing resentment toward this employer because of its prior litigation. These punitive actions by the Board are in direct contradiction of this Court's previous decisions. *See generally Carpenters, Local 60 v. NLRB*, 365 U.S. 651 (1961); *Republic Steel Corp. v. NLRB, supra*; *Consolidated Edison Co. v. NLRB, supra*. *See Florida Steel Corp. v. NLRB*, 587 F.2d 735, 753, note 10 (5th Cir. 1979) (where the court held that far less onerous access remedies than those imposed in the instant case were punitive).

The importance of this Court granting a writ to review and correct the Board's failure to follow the applicable decisions of this Court forbidding the imposition of punitive remedies is emphasized by the fact that the Board has been increasingly aggressive in its decisions

in ordering liberal "access" remedies to non-employee union representatives. *Compare Florida Steel Corp.*, 233 NLRB 491 (1977), *rev'd*, 587 F.2d 735 (5th Cir. 1979), with *Florida Steel Corp.*, 242 NLRB No. 195 (1979). The access remedies in the instant case represent the most extreme ones ever imposed by the Board, and yet are based upon the most isolated and minor violations of any case in which access remedies have ever been ordered. Indeed, it seems clear that the Board is attempting here to accomplish through the administrative process what Congress refused to do through the legislative process.[7]

b. The extraordinary remedies ordered by the Board do not adequately protect the legitimate interests of the employer

In exercising its remedial powers, the Board is required to adequately protect the legitimate interests of the employer. *Detroit Edison Co. v. NLRB, supra.* The employer interest which has most often gained the protection of this Court's jurisdiction in recent years is the employer's right to restrict the use of his property by union solicitors.[8] In *NLRB v. Babcock & Wilcox, supra*, the

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7. The Labor Reform Act of 1977, by amendment to Section 6 of the National Labor Relations Act, directed the Board to promulgate regulations providing "equal opportunity" for union organizers to enter onto an employer's property for the purpose of addressing employees on the issue of unionization. *House Comm. Rep. on Labor Reform Act of 1977*, 95th Cong., 1st Sess. (1977); *Hearings on S. 1883 before the Subcomm. on Labor of the Comm. on Human Resources*, 95th Cong., 1st Sess. (1977). The bill, H.R. 8410, passed the House, but was defeated in the Senate, S. 2467.

8. *NLRB v. Baptist Hospital, Inc.*, 440 U.S. 979 (1979); *Babbitt v. United Farm Workers*, ... U.S. ....., 60 L.Ed.2d 895 (1979); *NLRB v. Baylor Medical Center*, 439 U.S. 9 (1978); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Food Employees, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Court addressed the issue of whether non-employee union organizers, unlike employees already on the property,[9] can permissibly be denied access to an employer's property, for purposes of solicitation. The Court held that:

> [A]n employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. 351 U.S. at 112.

The Court went on to state that in considering any grant of access to company property to non-employee union organizers the Board must affirmatively balance the rights of employees to receive organizational information pursuant to Section 7 of the Act against the employer's constitutionally protected property rights and that "*[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.*" 351 U.S. at 112 (emphasis added). *See Hudgens v. NLRB*, 424 U.S. at 521; *Eastex, Inc. v. NLRB*, 437 U.S. at 570-71; *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180, 205-07 (1978).

Subsequently, in *Central Hardware Co. v. NLRB*, 407 U.S. at 544, the Supreme Court observed: "[i]n short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal."

In the instant case the Board has violated the petitioner's property rights in the following ways:

1. By granting non-employee union representatives the right to enter onto company property to solicit

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9. *See Republic Aviation Corp. v. NLRB, supra.*

employees in the canteens and rest and other non-work areas, including parking lots;

2. By granting non-employee union representatives the right to enter onto company property to attend company meetings with employees where the question of union representation is addressed, with the right of equal rebuttal time for one of the union representatives present at the meeting;

3. By granting non-employee union representatives the right to enter onto company property to deliver a 30-minute speech to employees on working time, in any case where the Board schedules an election in which the union participates; and

4. By granting non-employee union representatives the right to enter onto company property to use plant bulletin boards.

In spite of this Court's unequivocal directive to balance carefully the right of the employees to receive information in furtherance of their self-organization against the petitioner's constitutional property rights, there is not a single word in the Board's decision or in the opinion of the Fourth Circuit which addresses this fundamental point. This failure to even discuss the property rights of the petitioner is clearly in direct contravention of the repeated admonitions of this Court.[10]

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10. The Board's inclination to ignore the specific directives of this Court and of the circuit courts of appeals was recently analyzed in some detail by the immediate former general counsel of the Board in remarks before the American Bar Association's Section of Labor and Employment Law. He concluded with the following observations:

> Unfortunately for the legal process, we have hardly exhausted the list of recent instances in which the Board has failed to engage in adequate decisionmaking. The courts are

(Continued on following page)

The gravity of the error in failing to balance the employer's property rights against the employees' organizational rights in the instant case is emphasized by the fact that no court of appeals had ever previously approved the imposition of such extreme access to an employer's property as a remedy for unfair labor practices. In fact, as noted earlier, the Fifth Circuit, without reaching the issue of the application of *Babcock & Wilcox,* stated that such remedies were punitive. *Florida Steel Corp. v. NLRB,* 587 F.2d at 753, note 10. The only other cases in which a Court of Appeals has addressed such an access question in a remedial context involved this same petitioner, and those decisions have required the balancing mandated by *Babcock & Wilcox.* In *Stevens I,* the Board ordered that the union be given access to the petitioner's bulletin boards as part of its remedy for certain unfair labor practices found to have been committed. The Second Circuit denied enforcement of this portion of the Board's order because the Board had failed to show any unique problem of union access to employees. 388 F.2d at 305.[11] In a later case involving this petitioner, *Stevens II,* the Second Circuit, noting its refusal to enforce bulletin

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Footnote continued—

> well aware of the importance of rational Board decisions to stable labor management relations, and for that reason, the courts will continue to insist, in each case, upon a demonstration that the Board has analyzed the problem and has applied its expertise in a sensible way. In such circumstances, honest differences will arise between the Board and the appellate courts, and those differences should be resolved by the Supreme Court. But inertia and reiterated claims for deference are not acceptable substitutes for Supreme Court review. The Board would do much to increase its effectiveness and would conserve precious administrative and judicial resources as well, if it would pay more attention to the well-considered views of appellate courts. Daily Labor Report No. 48, p. D-6 (March 10, 1980).

11. The Second Circuit cited as authority its own decision in *NLRB v. S. & H. Grossinger's Inc.,* 372 F.2d 26, 30 (2d Cir. 1967), which in turn cites this Court's decision in *Babcock & Wilcox.*

board access in the earlier case, nevertheless enforced such access, but only after the Board had made what the Second Circuit considered to be the necessary showing. 388 F.2d at 905-06.[12]

In striking the required balance in the instant case, the Board should have first stated precisely how *Babcock & Wilcox* can be read to cover any fact situation other than the physical inability of union organizers to reach employees. The petitioner is of the opinion that *Babcock & Wilcox* stands for the proposition that non-employee union organizers cannot be given authorization to enter onto an employer's property so long as the physical design of the particular facility in question, or the residences of the employees to be reached, permit the organizer the opportunity to put forth his message. As the Court stated in *Babcock & Wilcox*: "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U.S. at 112. *See Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. at 205-07; *Central Hard-*

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12. Subsequently, the Second Circuit, in two decisions finding the petitioner in contempt of court, imposed access remedies. The earlier decision, *Stevens XIII*, covered five plants where the unfair labor practices were committed and the later case, *Stevens XVIII*, covered all plants in the Carolinas. The remedies imposed in those cases, however, have no bearing on the issue in the instant case. They emanated from the court's use of its contempt power, which is virtually unlimited, *see Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911), and which may properly ignore the constraints imposed upon the Board under the Act. On the other hand, the extraordinary access remedies imposed by the Board in the instant case are strictly limited by the authority given the Board in 29 U.S.C. § 160(c), as delineated by Supreme Court decisions, *e.g., Babcock & Wilcox. See Consolidated Edison Co. v. NLRB*, 305 U.S. at 236. Furthermore, in both cases, the court fully explained its reasoning in ordering such penalties.

ware Co. v. NLRB, 407 U.S. at 544-45. The Board obviously is of a contrary view, since there clearly is no "inaccessibility" issue in the instant case. But it has failed to state the reasons for its view, and the petitioner believes that no valid reasons exist.

Further, assuming that *Babcock & Wilcox* can be read to permit the Board to order the entry of non-employee union organizers onto company property, as a remedy for unfair labor practices, as distinguished from the purposes outlined in *Babcock & Wilcox*, the Board should have articulated a standard defining the circumstances under which such remedies are appropriate. Obviously, two isolated interrogations and one isolated threat, by two minor supervisors at one plant, standing alone, cannot be said to require broad remedies. If that be the case, literally hundreds of employers would have been subjected to such severe remedies. The administrative law judge appeared to recognize how absurd such a standard would be, since he held that the violations were not of a nature sufficiently serious to warrant such extraordinary remedies. The general counsel of the Board agreed and did not file exceptions to these findings by the judge (A29). Yet, the Board summarily ordered such severe remedies in direct contradiction to another of its decisions against this same employer issued only a few months later. In *J. P. Stevens & Co., Inc.*, 243 NLRB No. 159, 102 LRRM 1084 (1979), the Board found that an agent of the petitioner had engaged in two acts of interrogation and a threat of discharge and had solicited an employee to engage in surveillance. The Board held: "[r]egarding the additional remedies [involving access of non-employee union organizers] sought by the Charging Party, we are not persuaded that the nature and extent of the violations in this case require additional extraordinary remedies in order to correct them. We, therefore, decline to grant any addi-

tional extraordinary remedies in this case." 102 LRRM at 1085. The petitioner submits that the Board's treatment of these two cases involving the same petitioner is totally inconsistent and that this inconsistency stems from the absence of any enunciated standards for imposing such remedies.

On the property rights side of the balancing question, the Board should have fully analyzed how the entry of union organizers onto company property at all of the petitioner's 81 plants for a period of two years constituted only a "temporary and minimal" yielding of the petitioner's property rights. *See Central Hardware Co. v. NLRB*, 407 U.S. at 545. The petitioner is of the view that the remedies imposed run roughshod over the "temporary and minimal yielding" standard established by the Supreme Court. Again, however, this petitioner and all other employers subject to the Board's jurisdiction can only guess as to how the Board was able to squeeze the gross property invasions in the instant case within the purview of *Babcock & Wilcox*.

The Board's error in its handling of this case cannot be permitted to stand. It has imposed far-reaching access remedies, in violation of the petitioner's constitutional rights, without even recognizing the controlling decisions of the Supreme Court. The Board's application of these remedies to other employers[12] gives all of the indications that these onerous burdens will continue to be applied in the future. The Supreme Court has never before considered the novel and important question of whether the Board has the authority to deny an employer its property rights by permitting union organizers to enter its plants *as a remedy for unfair labor practices*, and a failure to grant a writ in this case will virtually license the Board to continue to deny employers their constitutional rights.

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12. *Supra* at 10.

VII. CONCLUSION

In summary, the Board found three minor violations to have occurred at one of the petitioner's plants in 1976. As a remedy, it ordered that union organizers be permitted to enter onto company property at each of the petitioner's 81 plants. This order by the Board was not supported by any explanation as to the necessity for such access and is unlawful for two reasons: (1) it is a punishment rather than a remedy; and (2) it does not protect the petitioner's legitimate property rights. Furthermore, the order is at variance with another Board order against this same petitioner, which rejected corporatewide access as a remedy for minor violations at a single plant. The Board's order constitutes an abuse of discretion, in violation of the petitioner's constitutional rights, and should be set aside to the extent it grants nonemployee union organizers extraordinary access to the petitioner's property. For these reasons, a writ of certiorari should be issued.

Respectfully submitted,

J. FRANK OGLETREE, JR.
HOMER L. DEAKINS, JR.
Attorneys for Petitioner

Of Counsel:

OGLETREE, DEAKINS, SMOAK, STEWART AND EDWARDS
3920 First National Bank Tower
Atlanta, Georgia 30303
(404) 588-1300

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, have been mailed, postage prepaid, through the United States mail, to each of the following persons at the addresses indicated below:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

Elliott Moore, Esquire
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

William H. McHugh, Jr., Esquire
600 Rhodes-Haverty Building
Atlanta, Georgia 30303

Arthur Goldberg, Esquire
General Counsel
700 Broadway
New York, New York 10003

This 22nd day of April, 1980.

HOMER L. DEAKINS, JR.

APPENDIX

Case 10-CA-12350

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J. P. STEVENS & COMPANY, INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO

DECISION AND ORDER

(Dated January 23, 1979)

On December 22, 1977, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, the General Counsel filed an exception and a supporting brief; the Charging Party filed exceptions and a brief, a reply to Respondent's supplemental brief, and a motion to remand to the Administrative Law Judge; and Respondent filed cross-exceptions and a brief, an answering brief to the exceptions of General Counsel and Charging Party, a supplemental brief, and a reply brief to the motion to remand.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, and to adopt his recommended Order as modified herein.

1. After the close of the hearing, but prior to issuing his Decision herein, the Administrative Law Judge issued a Notice To Show Cause why he should not take notice, in determining the appropriate remedy, of prior Board and court decisions involving Respondent, to which the Charging Party and General Counsel had referred in their briefs. Respondent filed a timely brief (refiled herein as its supplemental brief). Subsequent to the issuance of the Administrative Law Judge's Decision, the Charging Party filed a reply thereto and a motion to reopen the record (refiled herein). The Charging Party also filed with the Board a motion to remand to the Administrative Law Judge for consideration of its motion to reopen. The Charging Party's motion to remand is hereby denied as lacking in merit.

2. Although the complaint alleged that on or about May 10, 1976, Supervisor Dale Stevenson unlawfully interrogated and threatened employees, the Administrative Law Judge failed to consider the testimony of Joe Louis Robinson that Stevenson asked him during a conversation if he had "mailed in his union card yet." Stevenson, in denial, recalled no such conversation. There is an issue of credibility which, however, cannot be determined from the record as a whole because the Administrative Law Judge discredited Stevenson's testimony in one instance and credited it in another. Rather than remand the case for resolutions of credibility, we believe it would better serve the purposes of the Act to decide the case now, dismissing this aspect of the complaint, particularly because the remedy would not in any event be affected. Accordingly, the complaint insofar as it alleges unlawful threats to and interrogation of employee Robinson is dismissed.

3. In his exception the General Counsel requests that the Board's Order be applied to all of Respondent's plants.

In view of Respondent's history of serious and similar violations of the Act,[1] and its disregard of past Board Orders,[2] we find merit in the General Counsel's exception. Accordingly, we shall order Respondent to cease and desist from engaging in unfair labor practices on a corporate-wide basis. See *J. P. Stevens & Co., Inc.*, 239 NLRB No. 95 (1978).

4. The Charging Party also seeks certain additional remedies. Considering Respondent's long history of violations of employee rights and its flagrant disregard of Board decisions and court orders, and for the reasons set forth in *J. P. Stevens & Co., Inc., supra,* we shall grant the following additional remedies: mailing of the notice to all employees, reading of the notice, union access to bulletin boards and lists of employees names and addresses, and in-plant access for the Union. In addition, as Respondent contends that the alleged violations, if any, were committed by two minor supervisors, we shall order Respondent to issue written instructions to all of its supervisors at the plant involved herein to comply with the notice to employees marked "Appendix A."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Ad-

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1. See *J. P. Stevens and Co., Inc.*, 157 NLRB 869 (1966); 163 NLRB 217 (1967); 167 NLRB 258 (1967); 171 NLRB 1202 (1968); 179 NLRB 254 (1969); 181 NLRB 666 (1970); 183 NLRB 25 (1970); 186 NLRB 180 (1970); 190 NLRB 751 (1971); 205 NLRB 1032 (1973); 217 NLRB 513 (1975); and 220 NLRB 270 (1975). See also *The Blackhawk Corporation*, 177 NLRB 944 (1969), and 183 NLRB 267 (1970).

2. Respondent has been found in civil contempt by various United States courts of appeals. See *N.L.R.B. v. J. P. Stevens & Company, Inc., Gulistan Division*, 538 F.2d 1152 (5th Cir. 1976); *N.L.R.B. v. J. P. Stevens & Co., Inc.*, 563 F.2d 8 (2d Cir. 1977).

ministrative Law Judge, as modified and set out in full below and hereby orders that the Respondent, J. P. Stevens & Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall, on a corporate-wide basis:

1. Cease and desist from:

(a) Coercively interrogating employees about their or other employees' union activities or desires.

(b) Threatening employees with reprisals because of their union activities or protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post in conspicuous places in each of Respondent's plants, including all places where notices to employees are customarily posted, for a period of 60 consecutive days, copies of the attached notice marked "Appendix A." Copies of said notice,[3] on forms provided by the Regional Director for Region 10, shall be signed on behalf of Respondent by its president and the chairman of its board of directors, and, in addition, by each of the other members of the board of directors and by the highest managerial official of the plant in which the notice is posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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3. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Reproduce and mail to the home of each of its employees at all of its plants a facsimile of the aforesaid signed notice, together with the letter appended hereto as "Appendix B." Said letter shall be reproduced on the Company's regular business stationery and signed by the highest official of the recipient's plant. Also include in appropriate company publications, such as employee newsletters, a copy of the notice, together with Appendix B. Respondent shall provide the Regional Director for Region 10 with proof of such mailing and publication.

(c) Reproduce and give to each supervisor at its Tifton, Georgia, facilities a facsimile of the aforesaid signed notice, and give written instructions, signed by the highest official at the plant, to each supervisor to comply with the provisions of the notice. Respondent shall provide the Regional Director for Region 10 with proof of its compliance with this paragraph.

(d) At such reasonable time after the entry of this Order, as the Board may request, convene during working time by departments and shifts all its employees in each of its plants, and, at its option, either have the notice read by the highest managerial official in the plant or provide facilities and permit a Board agent to read the notice to the said employees. In the event Respondent chooses to have the notice read by its official, the Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent.

(e) Upon request of the Union, made within 2 years from the date hereof, immediately grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted, at each of Respondent's plants, for a period of 1 year from the date of request.

(f) In the event that during a period of 2 years following entry of this Order, any supervisor or agent of Respondent convenes any group of employees at any of Respondent's plants and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech and, upon request of said representatives, permit one of them to address the employees for the same amount of time as Respondent's address.

(g) If, within the next 2 years, the Board schedules an election in which the Union participates at any of Respondent's plants, then, upon request by the Union, afford at least two union representatives reasonable access to each of Respondent's said plants and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be within 10 working days before but not within 48 hours prior to any such election.

(h) Upon request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all of Respondent's employees at each of its plants as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during the 2-year period referred to above.

(i) For the 2-year period, upon request of the Union, without delay, permit a reasonable number of union representatives access for reasonable periods of time to all its canteens and rest and other nonwork areas, including parking lots, within each of its plants, for the purpose of communicating orally and in writing with the employees in such areas during changes of shift, breaks, mealtimes, or other nonwork periods. Respondent shall formulate rules on this subject in the same manner as provided in *J. P. Stevens & Co., Inc.*, 239 NLRB No. 95 (1978).

(j) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of unlawful conduct not specifically found to be violative herein shall be dismissed.

Dated, Washington, D.C. January 23, 1979

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
John C. Truesdale, Member
(Seal) National Labor Relations Board

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

After a hearing at which all sides had an opportunity to give evidence, the National Labor Relations Board has again found that we violated the National Labor Relations Act. We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through representatives of their own choosing

To act together for purposes of collective bargaining or other mutual aid or protection

To refrain from any or all these things.

WE WILL NOT coercively interrogate our employees about their or other employees' union activities or desires.

WE WILL NOT threaten employees with reprisals because of their union activities or protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act.

WE WILL send to all our employees copies of this notice, with an explanatory letter; WE WILL give all our supervisors at Tifton, Georgia, copies of this notice and instruct them to comply with its provisions. WE WILL read this notice to all our employees; and WE WILL grant the Union, as ordered, access to our bulletin boards, access to our nonwork areas, speaking opportunities, and lists of the names and addresses of our employees at many of our plants.

J. P. Stevens & Co., Inc.
(Employer)

Dated: ..... By .....
(President)

..... By .....
(Chairman of the Board of Directors)

..... By .....
(Member of the Board of Directors)

..... By .....
(Member)

..... By .....
(Member)

..... By .....
(Plant Manager)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Tower, Suite 2400, 101 Marietta Street, NW., Atlanta, Georgia 30303, Telephone 404-221-2894.

APPENDIX B

Dear Stevens Employee:

This letter, and the enclosed notice, is being sent to all J. P. Stevens employees to inform you of a recent decision by the National Labor Relations Board* relating to the Stevens facilities in Tifton, Georgia.

The Amalgamated Clothing & Textile Workers Union of America, AFL-CIO, has been trying to organize the Tifton hourly employees for the purpose of having them select that Union as their collective-bargaining representative. After a hearing the National Labor Relations Board found that the Company interfered with, restrained, and coerced employees in the exercise of their rights under the National Labor Relations Act.

As you can see from the enclosed notice, the Company has promised that, in the future, we will comply in good faith with the labor laws.

Sincerely yours

(Plant Manager)

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*If the Board's Order is enforced by a court of appeals, insert at this point, "approved by a United States Court of Appeals."

Case 10-CA-12350

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

J. P. STEVENS & COMPANY, INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO

Michael B. Frost, Esq., for the General Counsel.

J. R. Goldthwaite, Jr., Esq., and *William McHugh, Esq.* (*Adair, Goldthwaite & Daniel, P.A.*), of Atlanta, GA, and *Arthur Goldberg, Esq.*, of New York, NY, for the Charging Party.

Lewis T. Smoak, Esq., and *M. Baker Wyche, III, Esq.* (*Ogletree, Deakins, Smoak & Stewart*), of Greenville, SC, for the Respondent.

DECISION

(Dated December 22, 1977)

Statement of the Case

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on September 14 and 15, 1977, at Tifton, Georgia.

The charge was filed on October 26, 1976. The amended complaint in this matter was issued on May 25, 1977. The issues concern (1) whether Josephine Brooks is a supervisor within the meaning of Section 2(11) of the Act and (2) whether the Respondent, by certain supervisors, engaged in conduct violative of Section 8(a)(1) of the Act by (a) creation of the impression of surveillance of employee union activities, (b) promise of benefits, (c) threats of reprisals, and (d) interrogation of employees about their or other employees' union activities.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel, the Charging Party, and the Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Employer

The facts herein are based upon the pleadings and admissions therein.

J. P. Stevens & Company, Inc., the Respondent, is, and has been at all times material herein, a Delaware corporation, with an office and place of business located at Tifton, Georgia, where it is engaged in the manufacture of cloth products.

Respondent, during a representative 1-year period, sold and shipped finished products valued in excess of $50,000 directly to customers located outside the State of Georgia.

As conceded by Respondent and based upon the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer

engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved[1]

Amalgamated Clothing & Textile Workers Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Supervisory Status*

1. The status of Dale Stevenson is not disputed. Upon consideration of the original complaint and answer, the amended complaint and answer, and the credited testimony of witnesses, it is concluded and found that Dale Stevenson occupied the position of Shift Foreman for the Respondent and is and was a supervisor within the meaning of Section 2(11) of the Act.

2. The status of Arlie Blevins is not disputed. Upon consideration of the pleadings and admissions therein and the credited testimony of witnesses, it is concluded and found that Arlie Blevins is an overseer and is and was a supervisor within the meaning of Section 2(11) of the Act.

3. The status of Josephine Brooks is disputed. The General Counsel alleges and contends that Brooks is a supervisor within the meaning of Section 2(11) of the Act. The Respondent contends that Brooks does not possess the authority of a supervisor within the meaning of Section 2(11) of the Act.

Josephine Brooks is employed as a section leader in Respondent's mending department. The overall supervisor

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1. The facts are based upon the pleadings and admissions therein.

of such department is Arlie Blevins. Said department has approximately 110 employees and has 3 section leaders. Brooks' section has approximately 30 employees. Employees in the mending department are classified as menders, regraders, and cloth suppliers. Brooks has been a section leader for approximately 13-14 years. Section leaders receive a higher rate of pay than other employees. Thus, section leaders receive $4.28 per hour as compared to $3.90 per hour for regraders and $3.66 per hour for menders.

Brooks' duties include supplying the needs of menders, looking for defects to determine what needs to be done and how to repair and deciding whether to repair items. Brooks mends only on rare occasions. Brooks keeps time records on employees in her section, passes out paychecks to employees in her section, and has a desk in Blevins' office and a key to said office. Some critical styles of cloth are inspected by regraders. If defects are noticed, usually the section leader decides whether the material passes and proceeds to finishing or is returned to the mender for repairing, but not on production time. Section leaders must initial certain tickets for employees to receive incentive pay. Section leaders also can "no-credit" work resulting in employees being paid in accordance with time as opposed to "production." In the absence of Supervisor Blevins, section leaders oversee their sections in the department.

Brooks exercises authority in a limited way as regards granting time off to employees. Brooks testified to the effect that she had been granted authority to grant time off on a limited basis when an employee had a doctor's or dental appointment. Testimony of employee Henderson, however, revealed that Brooks granted her a day off on two occasions for personal reasons. Most persuasive was employee Robinson, a witness for the Respondent, who

testified that Brooks had authority on minor matters to grant time off and that she had been granted time off by Brooks to go to the bank or to attend to personal business.

Considering all of the foregoing, I am persuaded that the facts reveal that Brooks has authority to responsibly direct work of employees in her section, that Brooks exercises judgment in an independent manner affecting employee earnings, and exercises independent judgment in granting employees time off for a day or less involving personal business. Such authority and conduct reveal that Brooks is a supervisor within the meaning of Section 2(11) of the Act. It is so concluded and found.

B. *The Events of May 10, 1976*[2]

On May 10, 1976, Supervisor Stevenson spoke to Burks in the back of the plant. Stevenson asked Burks if he had signed a union card. Burks told Stevenson that he had signed a union card. Stevenson asked Burks why he had signed a union card. Burks told Stevenson that he had signed a union card because he wanted better benefits and more days off for vacation. Stevenson told Burks that he had done a fool thing, that he could take 2 weeks' vacation if he put in for it ahead of time.

Respondent's vacation-pay policy is as follows: An employee who has been employed for 1 year as of June 15 of the current year is entitled to 2 percent of said employee's gross earnings and 1 week's time off. An employee

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2. The two witnesses to the events of May 10, 1976, were employee Burks and Supervisor Stevenson. Burks testified to interrogation by Stevenson. Stevenson's testimony was not in denial that such interrogation occurred but was of the "I don't recall" type answer. Burks testified to a conversation about vacation time. Stevenson's testimony was in denial that he promised Burks vacation time if he rejected the Union. I credit Burks' testimony over Stevenson's as to the events in question.

who has been employed for 5 years as of June 15 of the current year is entitled to 4 percent of said employee's gross earnings and 2 weeks' time off. An employee who has employed for 15 years as of June 15 of the current year is entitled to 6 percent of said employee's gross earnings and 3 weeks' time off. The above policy was in effect at the time of Stevenson's statements to Burks on May 10, 1976.

Burks was employed initially sometime apparently shortly after July 1, 1971. Burks in accordance with the Respondent's vacation-pay policy had been receiving 1 week's time off and 2 percent of his gross earnings for vacation pay.[3] Since Burks would not have completed 5 years of employment by June 15, 1976, Burks would not have been entitled to 4 percent of his gross earnings or 2 weeks' time off as regards the 1976 vacation-pay plan. Rather, Burks would have been entitled to receive 2 percent and 1 week's time off around July 1976 and would have been entitled as of June 15, 1977, to the 4 percent of his gross earnings and 2 weeks' time off. Burks testified to the effect that the conversation with Stevenson on May 10, 1976, was the first conversation wherein he had been told that he could have 2 weeks off.

Considering the foregoing, I am persuaded and conclude and find, as alleged, that the Respondent, by Stevenson, unlawfully interrogated Burks about his union activity on May 10, 1976. There is no evidence of legitimate need for such interrogation. Nor is there evidence that assurances of nonreprisal were given to Burks by Stevenson. Under such circumstances, the interrogation of Burks as to his union activity was coercive in nature and therefore violative of Section 8(a)(1) of the Act. It is so concluded and found.

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3. The 2 percent of gross earnings appears to be substantially equivalent to an average week's pay.

Considering the foregoing, I am persuaded and conclude and find that the statements of Stevenson to Burks did not constitute, as alleged, unlawful promise of benefits to employees if the employees rejected the Union. First, there is no evidence that Stevenson spoke to Burks concerning vacation pay or time off based upon the question of rejection of the Union. Further, it is clear that the Respondent had a vacation plan in existence and that Burks was receiving a 1-week vacation in accordance with the plan. Although Burks testified to the effect that this was the first time he had been told that he could take a 2-week vacation if he put in for it, I find it hard to believe that an employee of approximately 5 years' duration would not be aware of the general outline of the vacation-pay plan and aware that after 5 years as of June 15 of the year that he would be entitled to a 2-week vacation. I am persuaded that under such circumstances the remarks suggest that Stevenson may have been confused as to exactly when Burks had been initially employed and that Stevenson's remarks were intended merely as argument relating to the existing plan as opposed to Burks' reasons for wanting a union. Further, I am persuaded that Burks would reasonably recognize Stevenson's statements as arguments and not as promise of benefits dependent upon rejection of the Union. Accordingly, the allegation of unlawful conduct in such regard is recommended to be dismissed.

C. *Events of June 21, 1976*[4]

On June 21, 1976, Supervisor Brooks approached employee Henderson at her machine and asked Henderson if she had attended a union meeting at the Ramada Inn.

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4. The facts are based upon the credited testimony of Henderson and Byrd. I found Henderson and Byrd both to appear more frank, forthright and truthful appearing witnesses than Brooks. I credit their testimony over Brooks' where in conflict.

Henderson told Brooks that she did not know that she had been supposed to go to the meeting. At this time someone called Brooks and Brooks left Henderson.

On June 21, 1976, Supervisor Brooks approached employee Byrd at her table while Byrd was talking to several fellow employees. What occurred is revealed by the following credited excerpts from Byrd's testimony.

* * *

> Well, we was there talking and Jo, she come up, and we was talking about the union and she asked us if we'd signed a union card, but Mary Ann and I, we had; Beverly, she hadn't. And she asked did we know anybody who had signed a union card and we told her no. So she asked us did we go to the meeting down at the Ramada Inn. So she asked us did we see any cars down there and we told her no, but Beverly had seen Billy Kimbrough's truck, and she told her.

* * *

> And she said all the things that J. P. Stevens had done for Billy Kimbrough while he was pushing the union and she was needed on the perch, so she left.

* * *

> Well, she said that we had it good then, but if the union come in things like we could come in and, like, if we had to leave or something, we could leave; but if the union come, we couldn't do it.

* * *

> Well, she said that Beverly was working eight hours more or less like we wanted to but the union would—well if the union come in we would have breaks and things now, that we would just have our breaks and we would have to give the union them eight hours.

* * *

She said with the hours, like, now we worked eight hours and we have breaks and maybe sometimes you don't go right back after the break is over; but she said if the union was in, that soon as that break over you'll have to be right back at work.

* * *

Considering the foregoing, I am persuaded and conclude and find, as alleged, that the Respondent, by Brooks, engaged in unlawful interrogation of employees about their and other employees' union activities. There is no evidence of legitimate need for such interrogation. Nor is there evidence that assurances of nonreprisals were given to the employees. Under such circumstances, such interrogation as to union matters was coercive in nature and violative of Section 8(a)(1) of the Act. It is so concluded and found.

Considering the foregoing, I am persuaded, and conclude and find, that the Respondent, by Brooks, as alleged, threatened employees with reprisals, tougher work conditions, if the Union were selected. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

D. *Events of August 1976*[5]

On a day in August of 1976, employee Sue Domingue was at her machine talking to an employee named Opal

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5. The facts are based upon a composite of the credited aspects of the testimony of Domingue and Blevins. Weeks was also presented as a witness to the issues involved in the events. Weeks clearly appeared to be an unreliable witness, lacking in frankness and forthrightness. I discredit her testimony. Domingue and Blevins both appeared to be witnesses attempting to tell the truth. Domingue, however, appeared reluctant to speak loudly enough to be heard. Domingue did not appear to have a reasonably precise recollection of when the event occurred. In sum, I find Blevins to appear a more reliable witness as to the events in August 1976 and credit his testimony over Domingue's where in conflict.

Weeks about the Union. Weeks and Domingue had talked about the Union in the past, and Weeks had expressed the opinion that the plant would be closed if the Union came in. On this occasion in August of 1976, Weeks expressed such opinion to Domingue. While Weeks and Domingue were talking, Supervisor Blevins walked up and asked them what they were talking about. Weeks and Domingue told Supervisor Blevins that they were talking about the Union. Domingue asked Supervisor Blevins what would happen if the Union came in. However, Weeks stated in effect again that the plant would shut down if the Union came in. Blevins made no comment and turned and walked away.

Considering the foregoing, I am persuaded and conclude and find that the facts do not establish, as alleged, that the Respondent, by Blevins, on August 15, 1976, threatened its employees that it would close the plant if the Union were successful in its organizational campaign. The General Counsel contends mainly that Supervisor Blevins specifically made a statement constituting a threat as alleged. Witness Domingue testified in effect to such a specific statement by Blevins. I have credited Blevins' testimony to the effect that he did not make such statement and have discredited Domingue's testimony to such effect. The General Counsel, however, further contends that if the facts are as found herein, that the Respondent, by Blevins, in effect adopted such statements of a threatening nature made by Weeks by virtue of Blevins' silence at the time. The General Counsel argues that the facts and findings thereupon in *Richland Textiles, Inc.*, 220 NLRB 615, 619, support a finding of violative conduct by the silence of Supervisor Blevins in the face of Weeks' statement. I reject such contention. Generally speaking, a respondent is not responsible for statements made by a

third party who is not an agent. The *Richland* case findings and conclusions of law represent in effect an exception to the general rule. In the *Richland* case the respondent was held liable for the failure to repudiate letters written by a prominent citizen which were distributed in such a manner as to indicate that the letters were authoritative. In the instant case, there is no evidence to reveal that Weeks was a person who employees should believe had inside or authoritative information or conveyed such information as to so indicate. No duty arose under such circumstances for Blevins to disavow such statements. Blevins' silence and walking away from the conversation more realistically reveal that he was not getting involved in the employee discussion about the Union. Accordingly, it is recommended that the allegations of unlawful conduct in such regard be dismissed.

E. *Alleged Events of August 28, 1976*

Taylor testified to the effect that on August 28, 1976, he had a conversation with Supervisor Stevenson wherein Stevenson referred to three employees nearby who were talking and said that he did not know what they were talking about but if it were about the Union and the Union came in, that they would be sorry. Taylor testified to the effect that Stevenson asked him how he thought the Union was doing and that he (Taylor) responded that he didn't know. Taylor also testified that Stevenson stated that he knew which seven people from A shift went to the first union meeting. Stevenson denied making such statements.

Cross-examination of Taylor as to how he recalled that the events occurred on August 28, 1976, revealed in my opinion that Taylor had no independent recollection of the date of August 28, 1976, but relied on the fact that such date was used in a pretrial statement. Thus, when

questioned, Taylor repeated the date of August 28, 1976, as the date of the event but no reason for the recollection of such date. Taylor, however, placed the day of the week of the event as being Thursday. It is noted that August 28, 1976, occurred on a Saturday. Part of Taylor's confusion as regards his pretrial statement and statement to the NLRB appears to flow from the fact that a pretrial statement was taken from Taylor close to the time of the alleged events, that at a much later date this statement became his NLRB pretrial affidavit when submitted to the NLRB and sworn to before an NLRB agent. Taylor later received a copy of such statement back from the General Counsel when he received his trial subpoena. In such statement were statements by Taylor pertaining to remarks allegedly by Stevenson as to employees paid by the Union. At the trial Taylor had no recollection of such remarks by Stevenson. In many respects Taylor appeared a confused witness. I am not persuaded that his testimony is reliable and find that Stevenson's testimony in denial of the events appear more reliable. I credit Stevenson's testimony in denial over Taylor's testimony as to the alleged events.[6]

Considering the foregoing, I am persuaded and conclude and find that the evidence does not establish that Supervisor Stevenson engaged in unlawful interrogation as to union activities as regards Taylor on August 28, 1976, and does not establish that Stevenson threatened employees through Taylor with threats of reprisals on August 21 or 28, 1976. Accordingly, allegations of unlawful conduct in such regard will be recommended to be dismissed.

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6. The complaint alleges unlawful interrogation as to union activity by Stevenson as occurring on August 28, 1976. The complaint also alleges that Stevenson, on August 21, 1976, threatened an employee with reprisals. It is clear that Taylor's testimony was presented as to these two issues but as occurring on August 28, 1976.

F. *Events of September 13, 1977*[7]

On September 13, 1977, the day before the trial in this matter, Supervisor Blevins attended a meeting with company lawyers. After such meeting Blevins walked by Domingue's work station. At such time Overseer Blevins asked Domingue how she was doing. Domingue told Blevins that she was tired. Blevins told Domingue that he was tired, that there was no sense to all the mess that had been going around there that day, that he had wanted to go to a funeral and should have gone but hadn't been able to go. Domingue asked Blevins why he hadn't been able to go to the funeral. Blevins told Domingue that he had been with the lawyers all evening, that someone had said that he had said that the plant would shut down if the Union were voted in. Domingue told Blevins that he shouldn't worry about it, that it would blow over one day.

Considering the foregoing, I conclude and find that the evidence is insufficient to establish, as alleged, that the Respondent, by Blevins, threatened an employee with reprisal if she testified in a National Labor Relations Board proceeding. Accordingly, allegations of unlawful conduct in such regard will be recommended to be dismissed.

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7. The facts are based upon a composite of the credited aspects of the testimony of Domingue and Blevins. Considering Domingue's initial direct testimony and the failure to include reference therein to remarks by Blevins as to "not forgetting," I discredit Domingue's testimony to the effect that Blevins stated at the end of the conversation that "he wasn't going to forget." I credit Blevins' denial that he made such statement. I am persuaded, considering the logical consistency of the evidence, that Domingue did state in effect to Blevins that the matter would "blow over." I discredit the testimony of Domingue and Blevins inconsistent with the facts found.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Both the General Counsel and the Charging Party contended in briefs for extraordinary remedies in this case. The undersigned issued a "Notice" relating to the taking of official notice of past Board decisions relating to Respondent's history of unfair labor practices and according the Respondent the right to present argument as to whether official notice should be taken of certain prior cases involving the Respondent and argument relating to possible remedy.[8]

In accordance with such notice, I have officially noted the decisions in *J. P. Stevens and Co., Inc.*, cases, reported at 157 NLRB 869; 163 NLRB 217; 167 NLRB 266; 167 NLRB 258; 171 NLRB 1202; 179 NLRB 254; 181 NLRB

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8. Respondent's supplemental brief received following such notice has been considered.

666; 183 NLRB 25; 186 NLRB 180; 190 NLRB 751; 205 NLRB 1032; 217 NLRB 513; and 220 NLRB 270.[9]

Upon consideration of the record in this case, arguments as to remedy, the Respondent's past history of unfair labor practices of the type involved in this proceeding and of other types, and for substantially the same reasons set forth by the Board in the *J. P. Stevens* case reported at 220 NLRB 270, I find merit to the General Counsel's request that an order requiring posting of the remedial notice at all of Respondent's plants be issued.

In such case reported at 220 NLRB 270, the Board said:

> In view of the extensive history of unfair labor practice violations by this Respondent and the repeated violations of the Act which are similar to those found in this case, we find that employees of the Respondent at other plants must be assured of their rights under the Act and that other employees must be assured that they are protected against similar violations by this Respondent. Accordingly, we find it necessary in these circumstances to order that Respondent post the notice at all of its plants.

Thus, as indicated, it will be recommended that the Respondent post the required remedial notice in all of its plants.

The Charging Party, in addition to corporate-wide posting of the remedial notice, requests additional remedies of (1) mailing of the order, (2) access to bulletin boards,

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9. I do not find it necessary to consider the history of unfair labor practices referred to in *The Blackhawk Corporation* cases, reported at 167 NLRB 266 and 183 NLRB 267. Were I to consider such cases, the remedy recommended would not be affected.

(3) employee lists, (4) reading of posted notice, (5) in-plant access to employees in nonwork areas during nonwork time, and (6) awarding of costs. I am not persuaded that the violations in this case reveal the necessity for the above referred to remedies. Rather, I am persuaded that the remedies recommended are adequate to eliminate the effect of the unfair labor practices found.[10]

Because of Respondent's history of unfair labor practices, I find that an order requiring not only cessation from specific unfair labor practices but also requiring the Respondent not to interfere with protected rights in any other manner is appropriate and necessary.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. J. P. Stevens & Company, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing & Textile Workers Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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10. See *J. P. Stevens* case reported at 220 NLRB 270, 271.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

Respondent, J. P. Stevens & Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees about their or other employees' union activities or desires.

(b) Threatening employees with reprisals because of their union activities or protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post at all of Respondent's plants copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and

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11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

12. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the allegations of unlawful conduct not specifically found to be violative herein be dismissed.

Dated, Washington, D. C. December 22, 1977

/s/ Jerry B. Stone
Jerry B. Stone
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT coercively interrogate our employees about their or other employees' union activities or desires.

WE WILL NOT threaten employees with reprisals because of their union activities or protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

J. P. Stevens & Company, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building - Room 701, 730 Peachtree Street, N.E., Atlanta, Georgia 30308, Telephone (404) 881-4741.

CASE 10-CA-12350

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

J. P. STEVENS & COMPANY, INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

(Dated January 23, 1978)

Comes Now Michael B. Frost, Counsel for the General Counsel in the above-styled proceeding, and pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, files the following Exception to part of the Order of the Honorable Jerry B. Stone, Administrative Law Judge, in his Decision issued December 22, 1977.

1.

To the failure to order the Respondent to cease and desist from engaging in the unfair labor practices on a corporate-side basis (J.D. 12, 1. 1).

Dated at Atlanta, Georgia, this 23rd day of January, 1978.

Respectfully submitted,

/s/ Michael B. Frost
Michael B. Frost
Counsel for the General Counsel

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers
Union, AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers
Union, AFL-CIO,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

On Petition for Review of an Order of the National
Labor Relations Board.

Argued December 6, 1979 Decided January 8, 1980

Before BUTZNER and PHILLIPS, Circuit Judges, and HONORABLE WALTER E. HOFFMAN, Senior District Judge for the Eastern District of Virginia, sitting by designation.

Lewis T. Smoak (M. Baker Wyche, III, Ogletree, Deakins, Smoak, Stewart and Edwards on brief) for petitioner; James B. Coppess (Arthur Goldberg, Joel Ax; William A. McHugh, Jr., Adair, Goldthwaite & Daniel, P.A. on brief) for intervenor-petitioner; Allison Beck, National Labor Relations Board (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Howard E. Perlstein, National Labor Relations Board on brief) for respondent.

PER CURIAM:

J. P. Stevens Co., Inc. petitions for review of a corporate-wide remedial order for violations of § 8(a)(1) of the National Labor Relations Act. The Board affirmed the administrative law judge's findings that the employer had coercively interrogated employees about union activities, threatened emplyoees with reprisals because of their union activities, and interfered with, restrained, and corced employees in the exercise of their rights under § 7 of the Act. The Amalgamated Clothing and Textile Workers Union, as intervenor, challenges the Board's failure to find additional violations and its omission of reasons for denying the Union's motions to remand and for litigation costs.

Upon consideration of the record, briefs, and arguments, we conclude that substantial evidence supports the Board's order.

J. P. Stevens Co. complains of the extraordinary nature of the relief granted for acts occurring only at its Tifton, Georgia plant. A reviewing court, however, must give deference to the Board's discretion in fashioning remedies for unfair labor practices. Fibreboard Corp. v. Labor Board, 379 U.S. 203, 215-17 (1964); J. P. Stevens & Co.,

Inc. v. NLRB, 406 F.2d 1017, 1022 (4th Cir. 1968). We conclude that the Board acted within its discretion to remedy those unfair practices established in the record.

After the administrative law judge rendered his decision in December 1977, the Union moved to reopen the proceedings to obtain a bargaining order because it allegedly achieved majority status. It asked the Board to remand this issue to the administrative law judge. The Board denied the motion explaining that it was "lacking in merit". We find no error in this ruling. Since the § 8(a)(1) violations occurred in May and June 1976 and the alleged majority was obtained subsequently in November 1977, it is evident that the unfair labor practices neither undermined majority strength nor demonstrated any impediment to an election. The Board's ruling that the motion lacked merit, therefore, was appropriate. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 610-16 (1969).

The Board's failure to discuss its denial of litigation expenses is also harmless. It is readily apparent from standards established in other Board cases that costs are awarded only for frivolous or dilatory litigation. Heck's Inc., 215 NLRB 765 (1974); Tidee Products, Inc., 194 NLRB 1234 (1972). The issues in this case have proven to be arguable and brought in good faith. In this respect the case differs from J. P. Stevens & Co., 239 NLRB No. 5 (1978), in which fees were allowed. Since the request for fees and expenses is ancillary to the major questions presented, the omission of any discussion of these established standards does not warrant remand.

ENFORCEMENT GRANTED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers Union, AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers Union, AFL-CIO,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

ORDER

(Filed February 12, 1980)

Upon consideration of the petition for rehearing; and

Upon consideration of the motion filed by J. P. Stevens & Co., Inc., to consolidate these petitions for review for hearing and rehearing en banc with the following:

79-1247/79-1254 - J. P. Stevens & Co., Inc./Amalgamated Clothing & Textile Workers Union, etc. v. NLRB

79-1101 - J. P. Stevens & Co., Inc., et al. v. NLRB

79-1624/79-1754 - J. P. Stevens & Co., Inc./Amalgamated Clothing & Textile Workers Union v. NLRB

79-1456/79-1664 - J. P. Stevens & Co., Inc./Amalgamated Clothing & Textile Workers Union, etc. v. NLRB

and the replies to this motion filed by the National Labor Relations Board and the Amalgamated Clothing & Textile Workers Union, intervenor;

In response to a request for a poll of the court on the motion to consolidate and for hearing and rehearing en banc, a majority of the active members of the court voted to deny the motion;

WHEREUPON, it is ADJUDGED and ORDERED:

1. The petition for rehearing is denied by the panel;

2. The motion to consolidate for hearing and rehearing en banc all of these petitions for review is denied.

Judge Widener and Judge Hall dissent from the denial of the motion to consolidate these petitions for review for hearing and rehearing en banc.

Chief Judge Haynsworth and Judge Russell did not participate in these proceedings.

/s/ John D. Butzner, Jr.
John D. Butzner, Jr.
United States Circuit Judge

ENTERED:
February 12, 1980

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Petitioner,

versus

National Labor Relations Board,
Respondent.

(Filed February 19, 1980)

Upon consideration of a motion of J. P. Stevens and Co., Inc., the petitioner in No. 79-1050, for stay of mandate pending application to the United States Supreme Court for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by Direction.

/s/ William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

ON MOTION FOR RECONSIDERATION OF THE DENIAL OF A STAY OF THE MANDATE

(Filed March 17, 1980)

Upon consideration of the motion filed by J. P. Stevens & Co., Inc., for reconsideration of the denial of a stay of the mandate;

With the concurrence of Judge Phillips and Judge Hoffman, it is ADJUDGED and ORDERED that the motion is denied.

/s/ John D. Butzner, Jr.
John D. Butzner, Jr.
United States Circuit Judge

Supreme Court, U.S.
FILED
AUG 1 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1637

J. P. STEVENS & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR J. P. STEVENS & CO., INC.

J. FRANK OGLETREE, JR.
HOMER L. DEAKINS, JR.
Attorneys for Petitioner

Of Counsel:

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(404) 588-1300

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

In The

Supreme Court of the United States

October Term, 1979

No. 79-1637

J. P. STEVENS & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR J. P. STEVENS & CO., INC.

J. P. Stevens & Co., Inc., the petitioner, files this supplemental brief for the purpose of calling attention to a new case not available at the time of its last filing.

In *Florida Steel Corp. v. NLRB*, 620 F.2d 79 (5th Cir. 1980), the United States Court of Appeals for the Fifth Circuit recently issued an opinion denying enforcement of Board-ordered remedies similar to those ordered in the instant case. Specifically, the Board ordered that in the event it scheduled a representation election at any of the employer's plants during a two year period, union representatives would be afforded the right to deliver a 30 minute speech to employees on company

property during working time, and would be granted equal time to respond to any address on the question of union representation made by employer representatives to employees on company property. 620 F.2d at 81.[1] The Board imposed these extraordinary remedies, on the grounds that "[t]he instant violation is yet another step in what can only be characterized as a corporate campaign to chill employee organizational activity throughout its facilities through unlawful conduct . . . [and] . . . because of [the employer's] history of interference with employee rights during organizational campaigns and even after employees have selected a union to represent them. . . ." 242 NLRB No. 195, 101 LRRM 1370, 1371.[2]

The court acknowledged that the Board "has broad discretion to determine what curative measures are needed with respect to a particular violation . . . and . . . may properly consider past conduct of the parties which may affect the scope of an effective remedy." 620 F.2d at 82. However, the court rejected the imposition of the extraordinary access remedies at the employer's nonunion plants[3] for the following cogent reasons:

> The essence of the Board's order *must*, . . . if it is to be remedial, *be based upon the conduct found by the*

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1. On a previous occasion, the Fifth Circuit struck down other remedies which involved the entry of union representatives onto the company property of Florida Steel Corporation. *See Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979).

2. The litigation history of Florida Steel Corporation is quite similar to that of the employer in the instant case. Florida Steel has been found guilty of unfair labor practices by the Board on 17 separate occasions since 1974, with enforcement ordered by the court in 10 of the 12 cases reviewed on appeal. *Florida Steel Corp. v. NLRB*, 620 F.2d at 82, note 5.

3. The court held that the imposition of the remedies at the employer's two union plants was justified, "albeit tenuously, as a means of deterring any repetition of the conduct before the Board and for preventing other efforts by the company to impair the effectiveness of the union as a bargaining representative." 620 F.2d at 83.

> *Board to violate the Act in the current proceedings.* It must be remembered that the Board is not empowered to monitor on a continuing basis the activities of a company or union found to have committed one or more unfair labor practices or to impose on a periodic basis additional requirements because of a past violation (Emphasis added). 620 F.2d at 83.

While the court expressly pretermitted the question of whether the Board order in the instant case could be distinguished on its facts, 620 F.2d at 83, it is clear that it cannot. As the Board order acknowledges, the extraordinary remedies in the instant case were imposed because of the petitioner's "long history of violations of employee rights" (A-3), as was the case in *Florida Steel.* The minor violations found to exist in the instant case, *i.e.*, two acts of interrogation and one statement that breaks would be handled differently if a union came in, made by two minor supervisors at one plant in Georgia, cannot be viewed as anything other than minor, isolated violations. *See J. P. Stevens & Co., Inc.*, 243 NLRB No. 159 (1979) (where four acts of coercion and restraint at one plant were viewed as "limited violations of a less than severe nature"). Therefore, to utilize such violations as a vehicle for imposing corporatewide access to company property for union organizers at the employer's 80 other plants in New England and other southeastern states is patently punitive.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK,
STEWART AND EDWARDS

By: J. FRANK OGLETREE, JR.
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Supreme Court, U. S.
FILED
JUN 4 1980
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1637

J. P. STEVENS & CO., INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1637

J. P. STEVENS & CO., INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION

We adopt the Question Presented and the Statement at pp. 2-4 of the Brief for the National Labor Relations Board in Opposition.

ARGUMENT

The petition challenges those portions of the Board's Order, approved by the Court of Appeals, which grant the union access to the company's property for the purpose of communicating with employees, and the use of plant bulletin boards for the same purpose. That Order, entered in response to exceptions filed by the union as the charging party, was based on "Respondent's long history of violations of employee rights and its flagrant disregard of Board decisions and court orders, and * * * the reasons set forth in *J. P. Stevens & Co., Inc.* [239 NLRB No. 95]". (Pet. A3)[1] Although petitioner employs the soft euphemism "litigation history" (Pet. 7) to characterize its past misconduct, the Court of Appeals for the Second Circuit has observed that that history "has earned the Company its reputation as 'the most notorious recidivist' in the field of labor law." *NLRB* v. *J. P. Stevens & Co., Inc.*, 563 F.2d 8, 13, *cert. denied*, 434 U.S. 1064 (*Stevens XVIII*).[2]

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[1] "Pet." refers to the Petition for a Writ of Certiorari herein. Petitioner J. P. Stevens & Co., Inc. will sometimes be referred to herein as "Stevens".

[2] Stevens' assertion that subsequent to the entering of the contempt order in *Stevens XVIII*, *"the Board has made no claim that the employer has violated any commitments under court orders* (Pet. 8, emphasis in original) is accurate only if read as asserting that the Board has not filed any subsequent contempt proceedings, for the Company continues to violate the Act, and the General Counsel has continued to file unfair labor practice complaints against it. The further assertion that the remedies herein "must be based upon the record in *this proceeding* and the compliance posture of the petitioner at the time of *this Board order* (*id.*, emphasis in original) is unsupported by any citation of authority and is plainly contrary to law. For example, as the Fifth Circuit said in another case arising out of Georgia, the Board may

The Board's order herein is based directly on the Second Circuit order in *Stevens XVIII*. (See *J. P. Stevens, etc.* 239 N.L.R.B. No. 95, *supra*, Board D&O p. 3, n. 5, approving in pertinent part A.L.J. Dec. p. 81, but eliminating a geographical limitation contained therein). In *Stevens XVIII* the Court ruled:

> The Master did not recommend any remedies designed to give the union access to Company employees. Several such remedies were, however, provided in *Stevens XIII*, and we believe that they are once again appropriate and necessary to "dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign." *Stevens II*, *supra*, 388 F.2d at 906. As in *Stevens XIII*, we order that the union be allowed to post notices on plant bulletin boards, 81 L.R.R.M. at 2286-87 ¶ 9; * * *
>
> * * *
>
> On the other hand, we [approve the Board] * * * proposal that the union be allowed access to certain non-work areas of Stevens's Carolina plants. It is apparent from this contempt adjudication that the in-plant organizing activities of Stevens's employees have been frustrated and discriminated against by the Company's policies. We recognize that [t]he policies of the [National Labor Relations] Act," in the context of a union organizing campaign, do not necessarily call for increased union access to the employees, but "call instead for a change in the plant's atmosphere." *Id.* But in this case, we believe that the two goals are complementary. Rea-

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consider the "atmosphere of persistent, long continued, flagrant violations [by the Company] occurring after and in spite of repeated declarations of illegality by Board and reviewing Courts." *J.P. Stevens & Co., Inc.* v. *N.L.R.B.*, 417 F.2d 533, 537 (*Stevens V*). The Company's "opposition leading to illegal excesses was not localized to the Georgia plants. Employees, too, may get the word. And that word was the story revealed by [earlier *Stevens* cases.] The warning was there for all to heed." *Id.* at 540.

> sonable solicitations for the union should be permitted without the employees' fear that they will be reprimanded or placed under surveillance by their supervisors. Giving the union access to some non-work areas of the plants will help to reduce this atmosphere of fear, and is therefore, an appropriate remedy to order in this case. [563 F.2d at 24-25, footnotes omitted.]

Stevens' petition for certiorari to review the order in *Stevens XVIII* was denied, 434 U.S. 1064. In that petition, as here (Pet. 10-16), Stevens objected particularly to the access provisions of the court's order, asserting that they were inconsistent with *Labor Board* v. *Babcock & Wilcox*, 351 U.S. 105. See Petition for Certiorari No. 77-726, p. 2 (Question 1); pp. 6-10. The argument that an access order was improper was also made in the unsuccessful Petition for Certiorari in *Stevens XIII* (*J. P. Stevens & Co.* v. *National Labor Relations Board*, 410 U.S. 926, denying certiorari to review 464 F.2d 1326).[3]

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[3] Stevens there argued:

> The 1967 and 1968 decrees of the court of appeals, which underlie this case, ordered the Petitioners to cease and desist from actions which were held to interfere with or restrain or coerce employees "in the exercise of their right to self-organization" * * *. It is to be noted that the decrees were designed to prevent unlawful interferences with the rights of employees, and that they were not intended to promote Union activities or the interests of any Union. Yet paragraphs 9, 10, 11 and 12 of the court's order confer direct benefits upon the Textile Workers Union of America, AFL-CIO, which are not only in conflict with the provisions of 29 U.S.C. § 158(a)(1), but which are neither necessary nor appropriate to the purpose of assuring that the Petitioners shall cease and desist from interfering with the rights of employees.

[Footnote continued on page 5]

Stevens' petition herein offers no argument of substance which would call for a different result than the denials of certiorari in *Stevens XIII and Stevens XVIII.*[4] It does assert that the Board's order interferes with its "property rights". (Pet. pp. 2, 10-16.) If this is intended as an argument of substance rather than a mere rhetorical flourish to underscore its *Babcock* argument, Stevens' assertion comes too late. For, before the Board, and the Court of Appeals, Stevens argued only that under *Babcock* the union was not entitled to access because other avenues of communication to the employees were available. It was not until Stevens' second motion for

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[3] [Continued]

As has been emphasized, in a civil contempt case orders are to be entered only for the purpose of producing compliance with the terms of the original and underlying decrees. In the underlying decrees in the case, there were no such provisions as, for example, requirements for the gathering of employees in the plants, on Company time, in order that Union representatives might come into the plants and make speeches to the employees, nor any requirements that the Company must furnish to the Union the names and home addresses of its employees. Therefore, the Court's placing of such requirements in the order now under consideration was affirmative punitive action, not action to assure that the Petitioners would cease and desist from interfering with the rights of employees. [Pet. for Cert. No. 72-740, pp. 18-19.]

[4] While Petitioner would distinguish *Stevens XVIII* on the ground that it was a contempt proceeding (Pet. 8), *civil* contempt orders must be remedial, rather than punitive, and therefore cannot be meaningfully distinguished from orders under § 10(c) of the NLRA. Petitioner's further point, that the order in *Stevens XIII* was limited to its plants in North and South Carolina does not raise an issue of the Board's *power;* rather it presents only a narrow difference of degree, which does not warrant this Court's attention.

stay in the Court of Appeals that it claimed that the order impermissibly deprived it of property. Under these circumstances that issue is not entitled to this Court's consideration. See e.g., *Adickes* v. *S. H. Kress and Company*, 398 U.S. 144, 147, n. 2. See also *U.S.* v. *Mitchell*, 48 L.W. 4365, 4368, n. 7 (April 15, 1980).

Even if it had been timely raised, petitioner's "property rights" argument would lack sufficient substance to warrant review. This Court has never held, either on statutory or constitutional grounds, that the Board lacks all power to require an employer to permit non-employee union organizers to enter onto its property in order to communicate with the employees regarding the employees' organizational rights. Rather, this Court's decisions, beginning with *Babcock*, 351 U.S. 105, 111-112, have established a standard whereby the Board is required to *balance* the employees' statutory rights and the employer's property rights.

And while Stevens argues that the balance should be struck in its favor, its reliance on *Babcock* and the other Labor Board cases cited at Pet. 10, n. 8 is fundamentally fallacious. For, whereas in those cases the issue was whether the employer had unlawfully interfered with its employees' statutory rights by denying access (in violation of § 8(a)(1) of the NLRA), the issue here is whether the access requirement is an appropriate remedy (under § 10(c)) for the company's violations of employee rights. Stevens is not "entitled to stand before the law as one who has never violated the law at all." *International Salt Co.* v. *U.S.*, 332 U.S. 392, 400. See also *National Society of Professional Engineers* v. *U.S.*, 435 U.S. 679, 697; "While the resulting order may curtail the exercise of [First Amendment] liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation."

CONCLUSION

For the foregoing reasons and those stated in the Brief for the National Labor Relations Board in Opposition, the Petition for a Writ of Certiorari should be denied.

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No. 79-1637

In the Supreme Court of the United States

OCTOBER TERM, 1979

J. P. STEVENS & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statement 2

Argument 5

Conclusion 10

CITATIONS

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 6

Black Hawk Corp., The, 177 N.L.R.B. 944, enforced in part, 431 F. 2d 900 (*Stevens VI*) 6

Black Hawk Corp., The, 183 N.L.R.B. 267 (*Stevens X*) 6

Butz v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 5

Decaturville Sportswear Co. v. *NLRB*, 406 F. 2d 886 ..... 8, 9

Detroit Edison Co. v. *NLRB*, 440 U.S. 301 ..... 5, 6

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 5

Florida Steel Corp. v. *NLRB*, 587 F. 2d 735 9

Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 9

Hudgens v. *NLRB*, 424 U.S. 507 5

Page

Cases—(Continued):

Int'l Union of Electrical, Radio and Machine Workers v. *NLRB*, 383 F. 2d 230, cert. denied, 390 U.S. 904 ..... 9, 10

J. P. Stevens & Co., 157 N.L.R.B. 869, enforced with modifications, 380 F. 2d 292, cert. denied, 389 U.S. 1005 (*Stevens I*) 6, 7

J. P. Stevens & Co., 163 N.L.R.B. 217, enforced with modifications, 388 F. 2d 896, cert. denied, 393 U.S. 836 (*Stevens II*) 6, 9

J. P. Stevens & Co., 167 N.L.R.B. 266, enforced with modifications, 406 F. 2d 1017 (*Stevens III*) 6, 9, 10

J. P. Stevens & Co., 167 N.L.R.B. 258, enforced with modifications, 406 F. 2d 1017 (*Stevens IV*) 6, 9, 10

J. P. Stevens & Co. (*Dublin-Nathaniel Plants*), 171 N.L.R.B. 1202, enforced, 417 F. 2d 533 (*Stevens V*) 6, 8, 9

J. P. Stevens & Co., Gulistan Division, 179 N.L.R.B. 254, enforced, 441 F. 2d 514, cert. denied, 404 U.S. 830 (*Stevens VII*) 6

J. P. Stevens & Co., 181 N.L.R.B. 666, enforced in part, 449 F. 2d 595 (*Stevens VIII*) 6

J. P. Stevens & Co., 183 N.L.R.B. 25, enforced, 461 F. 2d 490 (*Stevens IX*) 6

J. P. Stevens & Co., Gulistan Division, 186 N.L.R.B. 180, enforced, 455 F. 2d 607 (*Stevens XI*) 6

Page

Cases—(Continued):

J. P. Stevens & Co., 190 N.L.R.B. 751, remanded for reconsideration of additional remedies, 475 F. 2d 973, on remand, 205 N.L.R.B. 1032 (*Stevens XII*) 6

J. P. Stevens & Co., 217 N.L.R.B. 513, enforced, 547 F. 2d 792 (*Stevens XIV*) 6

J. P. Stevens & Co., 219 N.L.R.B. 850, enforced, 547 F. 2d 792 (*Stevens XV*) 6

J. P. Stevens & Co., 220 N.L.R.B. 270 (*Stevens XVI*) 6

J. P. Stevens & Co., 239 N.L.R.B. No. 95 (Dec. 12, 1978), enforcement pending, Nos. 79-1247 and 79-1254 (4th Cir.) (*Stevens XIX*) 4, 7

J. P. Stevens & Co., 240 N.L.R.B. No. 35 (Jan. 23, 1979), enforced, 612 F. 2d 881 (*Stevens XX*) 7

J. P. Stevens & Co., 240 N.L.R.B. No. 75 (Feb. 6, 1979), enforced, No. 79-1101 (4th Cir. Feb. 22, 1980) (*Stevens XXI*) 7

J. P. Stevens & Co., 243 N.L.R.B. No. 159 (Aug. 2, 1979), enforcement pending, No. 79-1456 (4th Cir.) (*Stevens XXII*) 7, 9

J. P. Stevens & Co., 244 N.L.R.B. No. 82 (Aug. 20, 1979), enforcement pending, No. 79-1502 (4th Cir.) (*Stevens XXIII*) 7

J. P. Stevens & Co., 245 N.L.R.B. No. 20 (Sept. 24, 1979), enforcement pending, Nos. 79-1624 and 79-1754 (4th Cir.) (*Stevens XXIV*) 7

Page

Cases—(Continued):

J. P. Stevens & Co., 247 N.L.R.B. No. 44 (Jan. 21, 1980), enforcement pending, No. 80-1058 (5th Cir.) (*Stevens XVI*) 7

Jacob Siegel Co. v. *FTC*, 327 U.S. 608 5

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 7

Montgomery Ward & Co. v. *NLRB*, 339 F. 2d 889 10

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 8

NLRB v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F. 2d 290 8-9

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 5

NLRB v. *H.W. Elson Bottling Co.*, 379 F. 2d 223 ..... 9, 10

NLRB v. *J. P. Stevens & Co.*, 464 F. 2d 1326, cert. denied, 410 U.S. 926 (*Stevens XIII*) 6

NLRB v. *J. P. Stevens & Co.*, 563 F. 2d 8, cert. denied, 434 U.S. 1064 (*Stevens XVIII*) 4, 5, 6, 7, 9

NLRB v. *J. P. Stevens & Co.*, 563 F. 2d 8 (*Stevens XVIII*) 4, 5, 6, 7, 9

United States v. *Lovasco*, 431 U.S. 783 6

Virginia Electric & Power Co. v. *NLRB*, 319 U.S. 533 5

Page

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C 158(a)(1) 2

Section 10(c), 29 U.S.C. 160(c) 5, 9

Section 10(e), 29 U.S.C. 160(e) 6

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NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A30-A32) is reported at 612 F. 2d 881. The decision and order of the National Labor Relations Board (Pet. App. A1-A28) are reported at 240 N.L.R.B. No. 35.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1980. A petition for rehearing was denied on February 12, 1980 (Pet. App. A33-A34). The petition for a writ of certiorari was filed on April 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in light of petitioner's repeated and present violations of the National Labor Relations Act, the Board reasonably exercised its remedial authority in ordering petitioner to accord union representatives, under specified circumstances, access to all of its plants for a two-year period.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act (the "Act"), 29 U.S.C. 158(a)(1), when, during the Union's[1] organizing campaign at petitioner's Tifton, Georgia plant in May and June 1976, two supervisors on three separate occasions coercively interrogated employees about their own and other employees' union activities and threatened employees with more onerous working conditions if they selected the Union as their representative (Pet. App. A1, A14-A15, A16-A18).

As a remedy for these unfair labor practices, which petitioner does not now challenge, the Board issued an order requiring petitioner not only to cease and desist from the unfair labor practices in question and to post a notice at the Tifton plant and petitioner's other plants, but also, *inter alia*, to take the following action at each of its plants for a two-year period (Pet. App. A5-A6):[2]

> (e) Upon request of the Union, * * * immediately grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted, * * * for a period of 1 year from the date of request.

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[1]Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC.

[2]In ordering these additional remedies, the Board modified the recommended order of the Administrative Law Judge, pursuant to exceptions filed by the Union (Pet. App. A3).

(f) In the event * * * [petitioner] convenes any group of employees at any of [its] plants and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech and, upon request of said representatives, permit one of them to address the employees for the same amount of time as [petitioner's] address.

(g) If * * * the Board schedules an election in which the Union participates at any of [petitioner's] plants, then, upon request by the Union, afford at least two union representatives reasonable access to each of [those] plants and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be within 10 working days before but not within 48 hours prior to any such election.

* * * * *

(i) * * * upon request of the Union, without delay, permit a reasonable number of union representatives access for reasonable periods of time to all its canteens and rest and other nonwork areas, including parking lots, within each of its plants, for the purpose of communicating orally and in writing with the employees in such areas during changes of shift, breaks, mealtimes, or other nonwork periods. * * *

The Board explained that these additional remedies were necessary in view of petitioner's "long history of violations of employee rights and its flagrant disregard of Board

decisions and court orders,[3] and for the reasons set forth in *J. P. Stevens & Co., Inc.*, [239 N.L.R.B. No. 95 (Dec. 12, 1978) (*Stevens XIX*)]" (Pet. App. A3).[4]

2. In a *per curiam* opinion, the court of appeals enforced the Board's order (Pet. App. A30-A32). Rejecting petitioner's challenge to the scope of the order, the court found that "the Board acted within its discretion to remedy those unfair practices established in the record" (Pet. App. A32). The court denied petitioner's petition for rehearing and denied its motion to consolidate for rehearing en banc the present case with other cases involving petitioner currently pending before the court (Pet. App. A33-A34). Petitioner's motion for a stay of mandate pending the filing of a petition for a writ of certiorari was also denied by the court (Pet. App. A35), as was a subsequent motion for reconsideration (Pet. App. A36). On April 28, 1980, this Court likewise denied petitioner's application for a stay.

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[3]The Board cited as examples *NLRB* v. *J. P. Stevens & Co., Gulistan Division*, 538 F. 2d 1152 (5th Cir. 1976) (*Stevens XVII*), and *NLRB* v. *J. P. Stevens & Co.*, 563 F. 2d 8 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (*Stevens XVIII*), in which petitioner had been found in civil contempt of court decrees enforcing Board orders.

[4]In *Stevens XIX*, which is pending before the Fourth Circuit on petitions to review and enforce the Board's order (Nos. 79-1247 and 79-1254), the Board ordered the same broad access remedies in light of petitioner's unlawful refusal to bargain with the Union, which had been certified as the employees' representative at petitioner's Roanoke Rapids, North Carolina plant. The Board explained that, in view of petitioner's past history of flagrant and persistent violations of the Act which were directed from its central offices and publicized at the other plants, it was "appropriate to afford the Union * * * access to all plants and employees, in the hope that the Union will in some measure be able to counteract the predictably adverse emanations which have flowed from what is now more than three years of fruitless bargaining at Roanoke Rapids." 239 N.L.R.B. No. 95 at 80.

ARGUMENT

Section 10(c) of the Act, 29 U.S.C. 160(c), accords the Board wide discretion to fashion appropriate remedies for unfair labor practices. "[T]he Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). See, *e.g.*, *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 316 (1979); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).[5] A Board order should not be overturned "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). The reviewing court "may decide only whether, under the pertinent statute and relevant facts, the [agency] made 'an allowable judgment in [its] choice of the remedy.' " *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 189 (1973), quoting *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612 (1946). In this case, the court of appeals properly applied these standards in concluding that the Board did not abuse its remedial authority in granting the Union access to petitioner's plants. Further review of this fact-specific question by this Court is therefore unwarranted.[6]

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[5]In *Detroit Edison Co.* v. *NLRB*, *supra*, the Court refused to enforce a Board order requiring an employer unconditionally to disclose to the union an aptitude test battery and answer sheet. 440 U.S. at 312-317. The Court found that the Board's remedy did not sufficiently protect "the Company's undisputed and important interests in test secrecy." *Id.* at 316. Petitioner points to no comparable legitimate business interest here. Indeed, pursuant to the 1977 decree in *Stevens XVIII*, petitioner has permitted union access in its numerous Carolina plants, and there is no showing that such access has interfered with the operation of petitioner's business.

[6]To the extent that petitioner contends (Pet. 11, 16) that the Board's limited order trenches on constitutionally protected property rights, its claim is without merit. See, *e.g.*, *Hudgens* v. *NLRB*, 424 U.S. 507, 521-523 (1976). In any event, petitioner failed to raise this claim before the Board and did not raise it in the court of appeals except in its motion for

1. Petitioner has engaged in a "massive multistate compaign to prevent unionization of its Southern plants." *J. P. Stevens & Co.* v. *NLRB*, 417 F. 2d 533, 537 (5th Cir. 1969) (*Stevens V*).[7] As the Second Circuit has observed, petitioner "has earned * * * its reputation as the 'most notorious recidivist' in the field of labor law." *NLRB* v. *J. P. Stevens & Co.*, 563 F. 2d 8, 13 (1977) (*Stevens XVIII*). Indeed, petitioner does not contend otherwise. Rather it maintains (Pet. 7-9) that, since the entry of the last contempt order against it in 1977, it has not "*violated any commitments*

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reconsideration of the court's denial of its motion for a stay of mandate. Accordingly, this contention is not properly before the Court. See *Detroit Edison Co.* v. *NLRB*, *supra*, 440 U.S. at 311 n.10; *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); 29 U.S.C. 160(e).

[7]See *J. P. Stevens & Co.*, 157 N.L.R.B. 869 (1966), enforced with modifications, 380 F. 2d 292 (2d Cir.), cert. denied, 389 U.S. 1005 (1967) (*Stevens I*); *J. P. Stevens & Co.*, 163 N.L.R.B. 217, enforced with modifications, 388 F. 2d 896 (2d Cir. 1967), cert. denied, 393 U.S. 836 (1968) (*Stevens II*); *J. P. Stevens & Co.*, 167 N.L.R.B. 266 (1967), and *J. P. Stevens & Co.*, 167 N.L.R.B. 258 (1967), enforced with modifications, 406 F. 2d 1017 (4th Cir. 1968) (*Stevens III* and *IV*); *J. P. Stevens & Co.* (*Dublin-Nathaniel Plants*), 171 N.L.R.B. 1202 (1968), enforced, 417 F. 2d 533 (5th Cir. 1969) (*Stevens V*); *The Black Hawk Corp.*, 177 N.L.R.B. 944 (1969), enforced in part, 431 F. 2d 900 (4th Cir. 1970) (*Stevens VI*); *J. P. Stevens & Co., Gulistan Division*, 179 N.L.R.B. 254 (1969), enforced, 441 F. 2d 514 (5th Cir.), cert. denied, 404 U.S. 830 (1971) (*Stevens VII*); *J. P. Stevens & Co.*, 181 N.L.R.B. 666 (1970), enforced in part, 449 F. 2d 595 (4th Cir. 1971) (*Stevens VIII*); *J. P. Stevens & Co.*, 183 N.L.R.B. 25 (1970), enforced, 461 F. 2d 490 (4th Cir. 1972) (*Stevens IX*); *The Black Hawk Corp.*, 183 N.L.R.B. 267 (1970) (*Stevens X*); *J. P. Stevens & Co., Gulistan Division*, 186 N.L.R.B. 180 (1970), enforced, 455 F. 2d 607 (5th Cir. 1971) (*Stevens XI*); *J. P. Stevens & Co.*, 190 N.L.R.B. 751 (1971), remanded for reconsideration of additional remedies, 475 F. 2d 973 (D.C. Cir.), on remand, 205 N.L.R.B. 1032 (1973) (*Stevens XII*); *NLRB* v. *J. P. Stevens & Co.*, 464 F. 2d 1326 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973) (contempt) (*Stevens XIII*); *J. P. Stevens & Co.*, 217 N.L.R.B. 513 (1975) and *J. P. Stevens & Co.*, 219 N.L.R.B. 850 (1975), enforced, 547 F. 2d 792 (4th Cir. 1976) (*Stevens XIV and XV*); *J. P. Stevens & Co.*, 220 N.L.R.B. 270 (1975) (*Stevens XVI*); *NLRB* v. *J. P. Stevens & Co.*, 538 F. 2d 1152 (5th Cir. 1976) (contempt) (*Stevens XVII*); *NLRB* v. *J. P. Stevens & Co.*, 563 F. 2d 8 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (contempt) (*Stevens XVIII*).

under court orders" (Pet. 8). Therefore, petitioner argues, in framing a remedy for the present violations, the Board is not entitled to take into account petitioner's past misconduct. The fact is, however, that petitioner's " 'program of experimentation with disobedience of the law' " (*Stevens XVIII*, *supra*, 563 F. 2d at 22, quoting from *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949)), has not ceased. Since 1977, the Board has issued orders against petitioner in seven additional cases, including the order here, finding violations of the Act at seven different locations.[8] Accordingly, although petitioner has not been charged with contempt since 1977, it is clear that petitioner continues to violate the Act.

In view of this history and the fact that petitioner's policies are "not determined at individual plant levels alone" (*J. P. Stevens & Co.* v. *NLRB*, 380 F. 2d 292, 304 (2d Cir. 1967) (*Stevens I*)), the Board reasonably concluded that petitioner's unlawful threats and interrogations during the union campaign at its Tifton, Georgia plant evidenced a continuation of its policy of violating the Act and also that news of these latest violations would likely inhibit employees at other plants in the exercise of their organizational rights.[9] The corporate-wide union access

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[8] *J. P. Stevens & Co.*, 239 N.L.R.B. No. 95 (Dec. 12, 1978), enforcement pending, Nos. 79-1247 and 79-1254 (4th Cir.) (*Stevens XIX*); *J. P. Stevens & Co.*, 240 N.L.R.B. No. 35 (Jan. 23, 1979), enforced, 612 F. 2d 881 (4th Cir. 1980) (*Stevens XX*); *J. P. Stevens & Co.*, 240 N.L.R.B. No. 75 (Feb. 6, 1979), enforced, No. 79-1101 (4th Cir. Feb. 22, 1980) (*Stevens XXI*); *J. P. Stevens & Co.*, 243 N.L.R.B. No. 159 (Aug. 2, 1979), enforcement pending, No. 79-1456 (4th Cir.) (*Stevens XXII*); *J. P. Stevens & Co.*, 244 N.L.R.B. No. 82 (Aug. 20, 1979), enforcement pending, No. 79-1502 (4th Cir.) (*Stevens XXIII*); *J. P. Stevens & Co.*, 245 N.L.R.B. No. 20 (Sept. 24, 1979), enforcement pending, Nos. 79-1624 and 79-1754 (4th Cir.) (*Stevens XXIV*); *J. P. Stevens & Co.*, 247 N.L.R.B. No. 44 (Jan 21, 1980), enforcement pending, No. 80-1058 (5th Cir.) (*Stevens XXV*).

[9] When the Board fashioned its remedy in this case (involving the Tifton, Georgia plant), *Stevens XXI* through *XXV*, which involve violations in plants in Massachusetts, Alabama, Virginia, and North Carolina, were pending before the Board.

remedy is designed to ameliorate this undesirable effect by facilitating communications between employees and the Union and adding a note of legitimacy to the employees' organizational activities. "On the surface, this may appear to be making the lot of the Union easier. But, it is being made easier solely because the employer has made that lot *harder* than the law tolerates." *Stevens I*, *supra*, 417 F. 2d at 541 (emphasis in original).

2. Relying on *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), petitioner argues (Pet. 10-11) that the Board's access remedies are improper in the circumstances presented here. But *Babcock & Wilcox Co.* held only that an employer, who had not otherwise violated the Act, did not commit an unfair labor practice by denying union organizers access to company property where the organizers had reasonable alternative means of communicating with employees. 351 U.S. at 109-114. Here, in contrast, the issue is whether the Board has reasonably permitted restricted union access as a remedy for repeated unfair labor practices. As the Sixth Circuit has explained in enforcing such an access remedy (*Decaturville Sportswear Co.* v. *NLRB*, 406 F. 2d 886, 889 (1969)):

> [T]he question [in *Babcock & Wilcox Co.*] was whether denial of access to company property in order to distribute union literature constituted an unfair labor practice and the Supreme Court held it did not. Here, the question is whether reasonable access to company property for a limited time is an appropriate remedial measure after a finding of unfair labor practices. The two questions involve different considerations.

Moreover, contrary to petitioner's assertion (Pet. 13), the courts of appeals have consistently enforced Board orders and fashioned contempt decrees requiring union access where, as here, such remedies are necessary to eradicate the effects of unfair labor practices. See, *e.g.*, *NLRB* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F. 2d 290, 294 (5th Cir.

1971); *Stevens V*, *supra*, 417 F. 2d at 540; *Decaturville Sportswear Co.* v. *NLRB*, *supra*, 406 F. 2d at 899; *J. P. Stevens & Co.* v. *NLRB*, 406 F. 2d 1017, 1021-1022 (4th Cir. 1968) (*Stevens III* and *IV*); *Int'l Union of Electrical, Radio and Machine Workers* v. *NLRB*, 383 F. 2d 230, 232 n.4 (D.C. Cir. 1967), cert. denied, 390 U.S. 904 (1968); *NLRB* v. *H.W. Elson Bottling Co.*, 379 F. 2d 223, 226 (6th Cir. 1967).[10] In fact, the access order in this case merely extends to all petitioner's plants the same access provisions that the Second Circuit, in *Stevens XVIII*, applied to every plant operated by petitioner in North and South Carolina. See 563 F. 2d at 24-25. The Second Circuit there found that such remedies were necessary to " 'dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign.' " *Id.* at 24 (quoting *Textile Workers of America* v. *NLRB*, 388 F. 2d 896, 906 (2d Cir. 1967) (*Stevens II*)). Here, as in *Stevens XVIII*, the limited access remedy is an appropriate remedy "to reduce this atmosphere of fear." 563 F. 2d at 25.[11]

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[10]Petitioner erroneously suggests (Pet. 9-10, 13) that the Fifth Circuit in *Florida Steel Corp.* v. *NLRB*, 587 F. 2d 735 (1979), disapproved an "access" remedy. In that case, however, the court of appeals found that substantial evidence did not support the Board's conclusion that the employer had violated Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act. Accordingly, the court did "not reach nor decide * * * the correctness of the company-wide broad form of order issued by the Board." 587 F. 2d at 754. Similarly, petitioner's reliance (Pet. 15) on *J. P. Stevens & Co.*, 243 N.L.R.B. No. 159 (Aug. 2, 1979) (*Stevens XXII*), is misplaced. In that case, the Board denied "a prospective bargaining order covering future bargaining requests anywhere in [petitioner's] enterprise" and not, as petitioner alleges, an access order such as that at issue here.

[11]Petitioner seeks (Pet. 14 n.12) to distinguish *Stevens XVIII* on the ground that the virtually identical access remedy imposed there was based on the contempt power and not the Board's remedial powers. But both civil contempt decrees and Board orders issued under Section 10(c) are remedial in nature. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911); *Stevens XVIII*, *supra*, 563 F. 2d at 21-22. Furthermore, even if a court's civil contempt power may in some way exceed the Board's power, the courts of appeals have repeatedly approved access

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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orders as appropriate Board remedial measures. See, *e.g.*, *Stevens III and IV*, *supra*; *Stevens V*, *supra*; *Int'l Union of Electrical, Radio and Machine Workers* v. *NLRB*, *supra*; *NLRB* v. *H.W. Elson Bottling Co.*, *supra*; *Montgomery Ward & Co.* v. *NLRB*, 339 F. 2d 889, 894 (6th Cir. 1965).

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No. 79-1637

In the Supreme Court of the United States

OCTOBER TERM, 1979

J. P. STEVENS & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioner, in its supplemental brief, contends that the decision of the court below conflicts with the recent decision of the Fifth Circuit in *Florida Steel Corp.* v. *NLRB*, 620 F. 2d 79 (1980). In that case, the Board found that the company had committed an unfair labor practice by failing to provide the union with information relevant to its duties as the certified bargaining representative in two of the company's plants. The Board ordered, *inter alia*, that the company for a period of two years afford the union an opportunity to address the employees on working time whenever the Board scheduled an election

involving the union at any of petitioner's plants or whenever the company chose to address its employees regarding union representation. See 620 F. 2d at 81; *Florida Steel Corp.*, 242 N.L.R.B. No. 195 (June 20, 1979), slip op. 5-8.[1] The Fifth Circuit upheld the Board's access order, but only as applied to the two plants where the union had been certified as the bargaining agent.

The Fifth Circuit explained that the access remedies were justified at the company's organized plants "as a means for deterring any repetition of the conduct before the Board and for preventing other efforts by the company to impair the effectiveness of the union as a bargaining representative" (620 F. 2d at 83). But the court refused to extend the access remedies to the company's plants where the union was not the certified bargaining representative, because such an order "cannot be viewed as remedial with respect to the charge before [the Board], one involving interference with the union's performance of its role as a bargaining representative" (*ibid.*). Citing the instant case, however, the Fifth Circuit expressly reserved the question "[w]hether such access might be properly ordered in other circumstances, *e.g.*, in connection with a charge for violations in connection with multi-plant organizational efforts * * *" (*ibid.*).

In short, as the Fifth Circuit specifically recognized, there is no conflict between the decision in *Florida Steel* and the court of appeals' decision in this case. *Florida Steel* involved a violation of the duty to bargain with the certified bargaining representative. In that context, the Fifth Circuit concluded that an access order concerning

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[1]Specifically, the order provided for one 30-minute address with regard to each election and equal time with regard to each company speech.

unorganized plants could not facilitate the bargaining duties of the union and thus served no remedial purpose. The present case, on the other hand, involves a multi-plant organizing campaign. In that situation, unfair labor practices at one of petitioner's plants might well inhibit organizational activity at any of its other plants. Accordingly, a broad access order is appropriate here, even if it was not proper in the circumstances presented in *Florida Steel*.

For these reasons and the reasons set forth in the Board's Brief in Opposition, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR J. P. STEVENS & CO., INC.

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REPLY BRIEF FOR J. P. STEVENS & CO., INC.

J. P. Stevens & Co., Inc., the petitioner, makes the following responses to the contentions raised in the brief for the National Labor Relations Board in opposition to the petition for a writ of certiorari in the instant case.

1. The Board represents that the petitioner failed to raise any claim concerning its constitutionally protected property rights "before the Board and did not raise it in the court of appeals except in its motion for reconsideration of the Court's denial of its motion for a stay of mandate." Board Brief, Note 6. It is correct that the petitioner did not raise the issue before the Board, since the issue

did not exist at the time. The recommended order of the administrative law judge did not contain the constitutionally offensive remedies as to which the petitioner seeks this Court's review, and the General Counsel of the Board did not object to his failure to include such provisions in his order (A25, A29). On the other hand, the petitioner did raise the issue of its constitutional rights before the court of appeals by numerous references to the "balancing" requirement mandated in *NLRB v. Babcock & Wilcox,* 351 U.S. 105 (1956). For example, in its petition for rehearing, the petitioner contended that "[a]s the Supreme Court said in *NLRB v. Babcock & Wilcox,* 351 U.S. 105, 112, there must be 'accommodation' between the organizing rights of employees and the property rights of the employer."

2. The Board states that "although petitioner has not been charged with contempt since 1977, it is clear that petitioner continues to violate the Act." Board Brief, p. 7. In support of this representation, the Board lists numerous cases involving this petitioner. *See* Board Brief, Note 8. The Board's claim is a gross misrepresentation of fact. All of the violations found to exist in the listed rulings occurred before the beginning of the compliance period for the 1977 contempt decree.

3. Despite the contentions by the Board, the fact remains that this Court has consistently required the Board to balance the employees' rights against the employer's property rights, and articulate its reasons for denying the employer's property rights, before denying the employer its constitutionally protected property rights. In this case, it is undisputed that the Board failed to do so. It is equally clear that the Board's newly developed remedy of permitting union organizers to enter onto company property as a remedy for unfair labor prac-

tices continues to gain in popularity with the Board. *See Sambo's Restaurant,* 247 NLRB No. 122, 103 LRRM 1181 (1980).

WHEREFORE, the petitioner urges the Court to issue a writ of certiorari in the instant case.

Respectfully submitted,

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